

Kaur (Migration) [2024] AATA 3709 (1 October 2024)

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DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms Gagandeep Kaur

REPRESENTATIVE: Mr Jujhar Bajwa (MARN: 0742209)

CASE NUMBER: 2214490

HOME AFFAIRS REFERENCE(S): BCC2022/3194208

MEMBER: Jade Murphy

DATE: 1 October 2024

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decision not to grant the applicant a Skilled (Provisional) (Class VC) visa.

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made on 1 October 2024 at 12:43pm

Statement

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CATCHWORDS

MIGRATION – Skilled (Provisional) (Class VC) visa – Subclass 485 (Temporary Graduate) – previous student visa application refused because of false or misleading information or bogus document – discretion to waive criterion – compassionate or compelling circumstances – actions of previous agent – employer may be affected – three-year period now passed – decision under review affirmed

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LEGISLATION

*Migration Act 1958 (Cth), s 65
Migration Regulations 1994 (Cth), r 1.03,
Schedule 2, cl 485.216, Schedule 4, criterion 4020(2)*

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 16 September 2022 to refuse to grant the applicant a Skilled (Provisional) (Class VC) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
5. The applicant applied for the visa on 12 August 2022. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 485.216 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because the delegate was not satisfied the applicant met the requirements of Public Interest Criterion (PIC) 4020(2).
6. The applicant appeared before the Tribunal on 1 October 2024 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi and English languages.
7. The applicant was represented in relation to the review, and at hearing.
8. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 485.216 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
10. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has a visa previously been refused based on a failure to satisfy PIC 4020(1)?

11. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing three years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).
12. As set out in the delegate's decision, the delegate found that the applicant did not meet the requirements of PIC 4020(2) because departmental records indicated that on 12 October 2020 the applicant lodged a Subclass 500 student visa and on 30 September 2021 the visa application was refused. The delegate noted that the previous visa refusal was in the period commencing three years before lodging this visa application and further, that the applicant had been refused this previous visa on the grounds of providing a bogus document or false and misleading information in relation to the application for that visa.
13. The Department notified the applicant of their concern and provided her with 28 days to provide a comment on the information to which the delegate stated they did not receive a response. The delegate also noted that no submissions regarding a waiver of the requirement were made either.
14. For these reasons, the delegate considered that the applicant did not satisfy the criteria as set out in PIC4020(2) for the grant of this visa.
15. At hearing, the Tribunal noted it had received the applicant's written submissions and attachments provided prior to hearing. The Tribunal asked the applicant what she would like to say regarding the delegate's decision to refuse this visa application.
16. The applicant agreed that there had been a failure to satisfy PIC4020(2) but made lengthy submissions regarding the circumstances that led to the first visa refusal. The applicant stated that it had been due to the actions of a previous migration agent whom she and her husband had relied on and trusted. The applicant maintained the refusal had not occurred because of any intention on her part to mislead the Department. The applicant gave evidence about her visa, study, and work history.
17. The Tribunal confirmed that the applicant conceded that there had been a failure to satisfy PIC4020(2) because she had a previous visa application refused based on failing to satisfy PIC4020(1) within the relevant period. The applicant agreed that she did not satisfy the requirements of PIC4020(2) and stated that she was requesting a waiver of the requirement. The Tribunal confirmed with the applicant's representative at hearing that the applicant was conceding that she did not meet the requirements of PIC4020(2) and that her submissions were to be considered regarding a waiver of the requirements. The applicant's representative confirmed the applicant's submission in this regard.
18. The Tribunal accepts the applicant's admission, and on the applicant's own evidence finds that she does not meet the requirements of PIC4020(2) because she had a previous visa application refused based on failing to satisfy PIC4020(1) within the relevant period.
19. Therefore, PIC 4020(2) is not met.

Should the requirements of PIC 4020(1) or (2) be waived?

20. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian

permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.

21. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity, or concern for others.
22. The Tribunal understands that the applicant believes there were extenuating circumstances beyond her control that led to her initial visa refusal for providing a bogus document. The Tribunal further accepts the submissions made regarding her visa, study, and work history in Australia. The applicant also submitted that the Tribunal should consider that the three-year period since the initial student visa was refused for a failure to satisfy PIC4020(1) has now lapsed.
23. The Tribunal accepts these submissions made by the applicant but does not consider that they constitute compelling circumstances that affect the interests of Australia, or that they are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa.
24. Although the Tribunal recognises that the applicant's employer, as an Australian may be affected by this decision, the Tribunal is not persuaded on the evidence (namely an employer statement) that the circumstances are particularly compelling or that there are any compassionate circumstances justifying to the granting of the visa for this reason.
25. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
26. Therefore, the requirements of PIC 4020(2) should not be waived.
27. Based on the above, the applicant does not satisfy PIC 4020 for the purposes of cl 485.216.

DECISION

28. The Tribunal affirms the decision not to grant the applicant a Skilled (Provisional) (Class VC) visa.

Jade Murphy
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

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Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

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bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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